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No. 91-522

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SAUDI ARABIA, *et al.*,
Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR RESPONDENTS TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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1. The United States ("the Government") urges this Court to grant the petition for certiorari on the basis of "confusion" in the decisions of the courts of appeals that does not, in fact, exist. As evidence of such confusion, the Government cites slight variations in the way courts have articulated the "based upon" requirement of the "commercial activities" exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2). Notwithstanding these variations, each of the circuits applies the same substantive standard.

a. Under this standard, the circuit courts, including the court below, uniformly hold that an "action is *based upon* a commercial activity carried on in the United States by a foreign state" when there is a "nexus" between that commercial activity and the conduct giving rise to the action.[1] "Isolated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity." *Stena Rederi AB*, 923 F.2d at

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[1] The strikingly similar language with which the courts have described the "based upon" requirement belies the Government's assertion that there is some "longstanding confusion" among the circuits (Brief for the United States as Amicus Curiae at 9) (hereinafter "U.S. Brief"): *Second Circuit*—requiring "a nexus * * * between the commercial activity in the United States and the cause of action," *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11, 13 (2d Cir. 1987), *cert. denied*, 484 U.S. 964 (1987); *Third Circuit*—requiring a nexus, *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-73 (3d Cir. 1980); *Fourth Circuit*—requiring a "material connection," *Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 4, 1991) (No. 91-956); *Fifth Circuit*—requiring a "material connection," *Stena Rederi AB v. Commission de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991); *Sixth Circuit*—requiring "a connection," *Gould, Inc. v. Mitsui Mining and Smelting Co.*, 947 F.2d 218, 220 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1657 (1992); *Ninth Circuit*—requiring "a nexus," *America West Airlines Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989); *Eleventh Circuit*—requiring a "jurisdictional nexus" (Pet. App. 12a); *District of Columbia Circuit*—requiring a "direct causal connection" or that the commercial activity be "an element of the cause of action," *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988).

387. Nor is the mere fact that a commercial activity in the United States occasioned a plaintiff's presence in a foreign state sufficient to support jurisdiction under section 1605(a)(2). *E.g., Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 892 (7th Cir. 1991); *Zedan*, 849 F.2d 1514. Instead, jurisdiction exists under the first clause of section 1605(a)(2) only when the conduct giving rise to the action constitutes or is directly related to a commercial activity in the United States. *See supra* note 1.

b. The Government cites only one case that articulates what is arguably a different formulation of the nexus requirement.[2] In *Santos*, the Seventh Circuit stated that "a claim is 'based upon' events in the United States if those events establish a legal element of the claim." 934 F.2d at 893. As a matter of substance, however, the Seventh Circuit reaches the same result as every other circuit. The conflict asserted is illusory.[3]

Even if the purported conflict stemming from the *Santos* decision were real, however, the present case would be an

[2] The Government also cites *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984) and G. Born and D. Westin, *International Civil Litigation in United States Courts* (1989) (which relies on *Vencedora*) for the proposition that the courts are in conflict. (U.S. Brief at 12 n.10). In fact, the Fifth Circuit adopted the "nexus" test in *Vencedora*, and the "varying formulations" enumerated in that case have since been rejected by every circuit in favor of the "nexus" or, in *Santos*, the substantially similar "legal element" test.

[3] *Santos* would have been dismissed even if the Seventh Circuit had articulated the nexus requirement in the same manner as every other circuit. *Santos* involved an employee of a U.S. corporation who found himself in France as a result of a leasing agreement between Air France (an instrumentality of France) and his employer. He was subsequently injured in a vehicular accident involving an Air France employee. As the *Santos* court acknowledged, the only connection between a commercial activity in the U.S. and the injurious conduct was that, had it not been for the lease, the plaintiff would not have been in France. 934 F.2d at 892. As discussed above, the circuits agree that this is not a close enough connection between a commercial activity in the U.S. and the complained of conduct to support jurisdiction under section 1605(a)(2).

inappropriate vehicle for resolving it because application of the *Santos* "legal element" test would not change the result here. Indeed, in *Santos*, the Seventh Circuit cited the opinion below with approval. The court reasoned that under the standard it was advocating, the duty on the part of the Saudi defendants not to detain, torture or otherwise punish Mr. Nelson for performing his duties at the King Faisal Specialist Hospital ("KFSH") arose out of the fact that the Saudi defendants recruited and employed him to perform those duties in the U.S. *Id.* at 894.[4]

2. Rejecting the common sense notion that an action is "based upon" commercial activity if it directly relates to or arises out of such activity, the Government would

[4] Under *Santos*, it is not required that the commercial activity actually constitute an element of the action. Rather, it is sufficient that "the duty [or other element] *arose from* commercial acts in the United States." 934 F.22 at 893 (emphasis added). Accordingly, the *Santos* court also cited with approval the decisions of several courts holding that where the national airline of a foreign government "sell[s] a plane ticket or otherwise make[s] travel arrangements in the United States (creating a duty of care in providing safe passage) and the flight crashes during travel outside the United States," jurisdiction is proper under section 1605(a)(2). Jurisdiction was found in these cases despite the fact that the airline obviously owes such a duty of care to all of its passengers regardless of whether commercial activity in the United States is involved. 934 F.2d at 894. (citing, among others, *Sugarman*, 626 F.2d at 272-74 and *Barkanic*, 822 F.2d at 13).

Correct application of the *Santos* "legal element" test would produce a finding of jurisdiction in each case cited in the Government's brief in which jurisdiction was found under the nexus test. In addition to *Nelson*, *Sugarman* and *Barkanic*, jurisdiction would have been found in *Gould*, 947 F.2d at 222 (involving substantial contract negotiations in U.S. during course of which an instrumentality of France misappropriated plaintiffs' trade secrets), and in *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 (D.C. Cir. 1982) (involving contract executed in U.S. for deliberate purpose of enticing plaintiff to Ireland in order to misappropriate his equipment, patents and trade secrets). Inasmuch as the *Santos* approach produces the same substantive results as the "nexus" test, there is no basis for the Government's assertion that the courts are employing "an unworkable ad hoc standard." (U.S. Brief at 8.)

interpret the first clause of section 1605(a)(2) to grant jurisdiction only where "the foreign state's commercial activity in [the U.S.] * * * provides the basis for the cause of action." (U.S. Brief at 15.) Under this standard, it presumably would not suffice that one element of the cause of action arise out of commercial activity within the United States, as in *Santos*. Rather, that activity, in and of itself, would have to provide the basis of the entire cause of action. Such a standard conflicts with the plain language, structure, underlying purposes and legislative history of the FSIA, as well as with the opinions of every circuit court that has considered the issue.

a. Congress did not intend to limit jurisdiction under the first clause of section 1605(a)(2) to situations in which the commercial act comprises the cause of action. Instead, Congress provided for jurisdiction over a foreign state in all actions "based upon a commercial activity carried on in the United States." As the courts have consistently held, this phrase is broad enough to include cases in which the commercial act constitutes the conduct giving rise to the action, as well as cases in which the commercial act directly causes or relates to such conduct.

b. To support its narrow interpretation of the first clause of section 1605(a)(2), the Government cites legislative history on the second clause, which provides for jurisdiction where "the action is based upon * * * an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." Because the House Report states that "the acts (or omissions) encompassed in [clause two] are limited to those which in and of themselves are sufficient to form the basis of a cause of action," H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19 (1976), the Government reasons that the same must hold true for clause one. (U.S. Brief at 15 n.14.)

This argument ignores the fact that Congress' purpose in enacting the FSIA was to provide American citizens "access to the courts in order to resolve ordinary legal disputes" with foreign states, H.R. Rep. No. 1487, *supra*,

at 6,[5] while protecting against the danger that "'our courts [might be] turned into small 'international courts of claims[,]' * * * open * * * to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.'" *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) (quoting, Hearings on H.R. 11315, *supra*, at 31 (testimony of Bruno Ristau, Chief, Foreign Litigation Section, Department of Justice)). To advance both these purposes, Congress enacted "substantive provisions requiring some form of substantial contact with the United States." *Id.* at 491.

Section 1603(e), by way of definition, limits the U.S. "commercial activity" referred to in the first clause of section 1605(a)(2) to activity "having substantial contact with the United States." Accordingly, apart from a nexus with the conduct complained of, no further restriction on access to American courts was intended or required. By contrast, the second clause does not require any commercial activity whatsoever to take place in the United States. Therefore, the House Report appropriately states that in this circumstance—and this circumstance alone—the act performed here must be sufficient in and of itself "to form the basis of a cause of action." The Government's interpretation would erase this distinction carefully drawn by Congress between clauses one and two.

c. The Government also maintains that its "approach is consistent with the examples provided in the congressional reports on the legislation." (U.S. Brief at 15 n.14.) In fact, its formulation would immunize foreign states far more broadly than Congress expressly intended.

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[5] *See also Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) (testimony of Monroe Leigh, Legal Adviser, Department of State) (hereinafter, *Hearings on H.R. 11315*) ("[T]he bill['s] * * * general purpose is simple: To assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would.").

Accordingly, *certiorari* should not rest on the assumption that there is a valid basis for this novel theory.

The legislative history cites, as an important example of a U.S. commercial activity, "an indebtedness incurred by a foreign state which *negotiates or executes* a loan agreement in the United States." H.R. Rep. No. 1487, *supra*, at 17 (emphasis added). Yet, under the Government's approach, section 1605(a)(2) would not grant jurisdiction even where all the negotiations on a loan agreement or other commercial contract took place in the United States, provided only that the contractual obligation ripened and the breach occurred elsewhere. In such case, no commercial activity would have occurred in the United States "provid[ing] the basis for the cause of action."[6] For instance, had Mr. Nelson alleged that Saudi Arabia and KFSH actively recruited him in the United States and engaged in detailed and protracted negotiations here, under the Government's theory he would be unable to sue them for wrongful termination or other contractual breach if the final offer, acceptance and breach all occurred in Saudi Arabia. Plainly, this is inconsistent with the FSIA's underlying purpose of according American citizens a U.S. forum for redressing their private disputes with foreign states.[7]

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[6] Taking the same approach to section 1605(b) of the FSIA likewise would yield results Congress did not intend. Section 1605(b) provides an exception to foreign state immunity for certain suits in admiralty to enforce a maritime lien, which "lien is based upon a commercial activity of the foreign state." Application of a requirement that the commercial activity comprise the cause of action would preclude the bringing of traditional maritime actions, such as collision claims. Accordingly, under the Government's approach, "many litigants who could have maintained an action in the courts of this country during the period when the Tate Letter was the controlling factor would now find themselves without a remedy in our courts." *China Nat'l Chemical Import & Export Co. v. M/V Lago Hualaihue*, 504 F. Supp. 684, 690 (D. Md. 1981).

[7] In fact, far from supporting the Government's theory, the only statement in the legislative history of the FSIA that explains the meaning of the "based upon" requirement of clause one supports the result in the court below. *See Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 29 (1973) (testimony of Bruno Ristau) ("If a dispute arises *as a result of* an activity which a government carries on in this country, the most appropriate place to resolve such a dispute would be in this country through the courts[.]") (emphasis added).

3. The Government concedes, as it must, that Mr. Nelson's recruitment in the United States by an agent of Saudi Arabia—the Hospital Corporation of America ("HCA")—constitutes "a commercial activity carried on in the United States" by Saudi Arabia. (U.S. Brief at 14.)[8] It then argues, however, that HCA's sole principal was Saudi Arabia, and therefore "it appears that [KFSH] did not carry on any commercial activity in the United States." (*Id.* at 16 n.17.) It bases this argument solely upon its assertion that only "the Kingdom of Saudi Arabia—and not [KFSH]—contracted with HCA to recruit employees for the hospital." (*Id.* at 14 n.13.)

In fact, both KFSH and Saudi Arabia were parties to and signed the contract with HCA. An attachment to the contract bears the seal of KFSH on each page and explicitly states that "HCA will provide recruitment services to [KFSH]." The Declaration of Ali S. Al-Shabrami, cited by the Government (*id.* at 15 n.15), states that "The hospital * * * has a contract with HCA vesting exclusive responsibility for recruiting in the U.S." Moreover, among HCA's commercial activities in the United States, conducted on behalf of and as agent for KFSH, was the execution of an employment contract with Mr. Nelson.[9] Finally, Mr. Nelson's complaint alleges that

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[8] *See* H.R. Rep. No. 1487, *supra*, at 16 ("Activities such as a foreign government's * * * employment or engagement of laborers * * * would be among those included within the definition.").

[9] The Government admits the employment contract was between Mr. Nelson and KFSH, but does not acknowledge that he was also an employee of Saudi Arabia. (U.S. Brief at 15 n.15.) In fact, an addendum to Mr. Nelson's contract states that Mr. Nelson "will be an employee of the Government of Saudi Arabia at [KFSH]." Similarly, a document sent to Mr. Nelson from KFSH extending him a conditional offer states that it is an offer "to you on behalf of the

KFSH is "an agent, instrumentality and alter ego of the sovereign nation of Saudi Arabia" and that Mr. Nelson was recruited in Miami, Florida by KFSH "or its agents to fill the position of Monitoring Systems Engineer at KFSH." (Complt. ¶¶ 40, 41.) All of these allegations must be accepted as true for purposes of resolving this petition.[10]

4. The Government appears to acknowledge that if Respondents can establish that their cause of action is "based upon a commercial activity carried on in the United States," jurisdiction is proper under the FSIA. Accordingly, the Government has retreated from the position it took in the court below that the "police conduct" of Saudi officials in arbitrarily detaining and torturing Mr. Nelson "is clearly sovereign rather than commercial * * * [and], therefore, not covered by the FSIA commercial activities exception, regardless of whether or not it is intertwined with commercial activity." (Pet. App. 44a-45a).[11] Instead, the Government now merely notes some

Saudi Arabian Government for employment at the King Faisal Specialist Hospital Center in Riyadh, Saudi Arabia, for 24 months."

[10] The complaint also alleges that Royspec can be held liable for the acts of Saudi Arabia and KFSH because it is an "agent, instrumentality and alter ego of the sovereign nation of Saudi Arabia and the King Faisal Specialist Hospital" and it was directly involved in Mr. Nelson's recruitment and employment. (Complt. ¶¶ 60-62.) These allegations must be accepted as correct and were so accepted by the court below. (Pet. App. 16a-17a.)

[11] Even if the FSIA authorized such a "law enforcement" exception, which it does not, the Government's argument in the court below misses the mark. Suit was brought against KFSH, Royspec and the Saudi government based solely on the commercial activities of these three entities in connection with their retaliation against Mr. Nelson for his having performed precisely those job functions he was recruited and employed to perform in the United States. Neither KFSH nor Royspec is a law enforcement agency. Moreover, the Saudi Government was engaged neither in law enforcement nor in any other function recognizably sovereign in character when it intervened at the bequest of administrators at a state run hospital in a private dispute with one of the hospital's employees. Certainly it performed no legitimate sovereign function when its intervention turned to torture.

"heightened" importance to this case because "it implicates the foreign state's exercise of law enforcement activity within its own borders." (U.S. Brief at 8.)[12]

The Court should decline the Government's veiled invitation to erect, outside the FSIA, some exceptional immunity for acts otherwise clearly subject to the jurisdiction of our courts based solely upon the alleged involvement of law enforcement personnel or functions.[13] The

[12] The Government's representation that there is "no dispute" concerning this implication of law enforcement authority is incorrect. In Respondents' Brief in Opposition to Petition of Writ of Certiorari, Respondents flatly denied the existence of any facts suggesting the "exercise of police power." (*Id.* at 1-4.)

The Government argues that if jurisdiction in this case is allowed to stand, "foreign courts may similarly elect to review the United States' exercise of police power within its borders." (U.S. Brief at 13 n.11.) Experience suggests that this concern is entirely speculative. First, foreign states have been subject to the jurisdiction of U.S. courts for the tortious and egregious acts of their law enforcement authorities committed on U.S. territory since 1980. *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). Yet, in the last twelve years, agents of U.S. law enforcement operating abroad have not found themselves burdened with foreign lawsuits, frivolous or otherwise. Second, much of the law enforcement responsibility in this country is entrusted not to federal or even to state authorities, but rather to county and municipal governments. Although it is well established that such local and municipal entities are not entitled to immunity under international law, *e.g.*, 6 M. Whiteman, *Digest of International Law* 589 (1968), local and municipal law enforcement authorities have not been, so far as we can ascertain, pressed to defend their conduct in foreign courts.

[13] To the extent the Government correctly characterizes these functions as raising "matters of particular sensitivity among sovereign nations" (U.S. Brief at 13), the doctrine implicated is not sovereign immunity, but act of state. *E.g.*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697-98 (1976). Though the act of state doctrine is not before this Court, it is worth noting that torture and other universally condemned practices can under no circumstances be characterized as official acts of state. *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Liu v. Republic of China*, 892 F.2d 1419, 1433-34 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 27 (1990); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984).

FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts," which jurisdiction in "'every action * * * depends on the existence of one of the specified exceptions to foreign sovereign immunity.'" *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989) (quoting *Verlinden*, 461 U.S. at 493). Accordingly, if correctly applying the appropriate standard under one of the enumerated statutory exceptions, a court determines that jurisdiction is proper, the FSIA permits, indeed requires, no further inquiry.

5. Even were the Court to adopt the standard urged by the Government, the FSIA would provide jurisdiction over Respondents' negligence Counts (Counts 1, 9 and 13). The Government concedes as much, stating that "if Saudi Arabia somehow breaches a duty of reasonable care in its recruitment activity, it may be subject to suit for negligence." (U.S. Brief at 17.) The Government argues, however, that Florida tort law provides no basis upon which Saudi Arabia could be found liable, for example, on a negligent failure to warn theory. (*Id.* at 17-18.)[14] The issue whether Respondents have stated a cause of action for negligence under Florida law is not one that this Court need review. Nor should it, as the Government intimates, immunize Saudi Arabia with respect to a negligence claim of this type, where (as here) jurisdiction arises even under the Government's own interpretation of the FSIA's commercial activities exception. (*Id.* at 18.)

CONCLUSION

For the foregoing reasons, respondents request that the petition in No. 91-522 be denied.

[14] In support of its interpretation of Florida law, the Government cites only *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1536 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985). *Arango* did not reach the issue. Moreover, the question of duty to warn arose under circumstances quite different from those here. Finally, in an earlier decision in the same case, the Fifth Circuit held that jurisdiction existed under section 1605(a)(2) because the negligence claims there were based upon the foreign state-owned airline's commercial activities in the United States. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379-80 (5th Cir. 1980).

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